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I've enjoyed participating over the years in the NYU Institute of Labor Relations. I think this has been a tremendously valuable series for the labor management practitioners. Next year I may attend as a student.

Review of NLRB on Election Campaigns

History of NLRB's changing standards on representation election campaign rhetoric is reviewed by David L. Benetar at New York University's 32nd National Conference on Labor

The checkered career of the NLRB's standards governing honesty in representation election campaigns was traced by David L. Benetar of the New York City law firm of Benetar, Isaacs, Bernstein & Shair in an address delivered at New York University's 32nd National Conference on Labor.

The NLRB standards governing honesty in election campaigns, Benetar said, may be traced as far back as the 1948 General Shoe Corp. case. In General Shoe, the Board said that as far as practicable elections for collective bargaining representatives should be conducted under "laboratory conditions" (21 IRRM 1205).

What the Board meant by "laboratory conditions" was delineated in later decisions. In the 1955 Gummed Products Co. case, for example, the Board set forth its standards in these general terms:

"Exaggerations, inaccuracies, partial truths, name calling, and falsehoods, while not condoned, may be excused as legitimate propoganda, provided they are not so misleading as to prevent the exercise of a free choice by employees in the election of their collective bargaining representative. The ultimate consideration is whether the challenged propoganda has lowered the standards of campaigning to the point where it may be said that the uninhibited desires of the employees cannot be determined in an election" (36 IRRM 1156).

HOLLYWOOD CERAMICS

In the (1962) Hollywood Ceramics case, Benetar pointed out, the Board's rules were crystallized and stated comprehensively. It

said that misrepresentation or "campaign trickery" would be the basis for setting aside an election where:

⊗ The misrepresentation or trickery involved a substantial departure from the truth;

⊗ It was material and substantial and might reasonably be expected to have a significant impact on the election; and

⊗ It was made at a time when the other party did not have a reasonable opportunity to respond or reply (51 IRRM 1600).

The factual situation in Hollywood Ceramics, Benetar said, exemplified the kind of misrepresentation that would result in setting an election aside. On the day before the election, the union distributed a handbill purporting to compare wage rates of job classifications in the plant with those in other union ceramic plants.

But rates set forth for the Hollywood Ceramics plant excluded incentive earnings, while the allegedly comparable rates in the other plants included them. Moreover, the plants used for comparison, although in the same industry, were not truly comparable as to the type of operations and degree of skill required.

The Hollywood Ceramics rule, Benetar observed, held sway for 15 years—20 years from the date of its progenitor, Gummed Products.

SHOPPING KART

But in Q977, Benetar observed, the Board abruptly nullified the rule in the Shopping Kart Food Market case. Moreover, the nullification was accompanied by a sweeping conclusion that the Board's more than 20 years' experience with Hollywood Ceramics and Gummed Products had revealed that, although adoption of the rule was premised on assuring employee free choice, its administration had in fact tended to impede the achievement of that goal.

It is interesting to note, Benetar added, that the change in policy was announced as dictum, since the Board was unanimous in finding that the alleged misrepresentations would not have justified setting aside the election even under the abandoned Hollywood Ceramics rule (94 IRRM 1705).

Part of what followed in the wake of Shopping Kart, Benetar said, might well have been predicted.

First, the question of retroactivity of a

change in policy came up for the first time in the courts. In Blackmun-Uhler Chemical Division v. NLRB the Fourth Circuit, in denying enforcement of a bargaining order, remanded the case to the Board for a determination as to whether the Shopping Kart rule should be applied retroactively (98 LRRM 2307).

Ruling on the remand, the Board decided that it would not apply Shopping Kart retroactively. (99 LRRM 1702)

GENERAL KNIT

On the same day, the Board came full circle on the misrepresentation issue and overruled Shopping Kart, which had overruled Hollywood Ceramics. So in the General Knit case, decided less than two years later, the Board abandoned Shopping Kart and returned to the Hollywood Ceramics rule.

The majority opinion in General Knit expounds at considerable length the rationalization for returning to the Hollywood Ceramics rule. And Member Truesdale in a speech delivered shortly after sharply rejected the argument that campaigning by either side has little or no effect on the outcome of the elections.

This conclusion, Benetar asserted, went against the common experience of many seasoned practitioners and correctly was rejected.

But Benetar then added these comments:

"Although logic, experience and arguments were all summoned by the Shopping Kart majority to support their drastic conclusion, it cannot be ignored that the majority became a majority (both in Shopping Kart and in General Knit) by virtue of changes in the membership of the Board."

Benetar commented:

"What observations may fairly be made on the subject of the Board's undoubted legal right to change its views? How can it best reconcile its duty to correct judgments which the Board's experience truly teach it to have been wrong with its obligations to provide predictable guidelines which will lend stability not uncertainty to this volatile field?

"Obviously no answer to this question can be a blueprint for future actions. But some points seem clear. Changes in fundamental policy should not follow simply because of changes in Board personnel.

Changes should in the words of the Supreme Court stem from the evolutionary approach. When the Board, however, abandons a rule of 20 years standing ostensibly because of new insights gained over those years and then reverts to the rule after a year and a half, saying in effect the rejected rule was sound, the evolutionary quality of the first change is cast into considerable doubt.

"Another suggestion: Where the Board is confronted, as it was in this area, with questions (a) as to the interest employees take in election campaign statements and (b) as to their degree of sophistication in detecting misrepresentations on their own without independent research sources and without the safeguard of adversarial exposure of such misrepresentations, why not ask the practicing profession what its experience has been? I venture to suggest the Board would have been answered with a considerable degree of consensus of both sides that Hollywood Ceramics was right and Shopping Kart wrong?"

HICKORY SPRINGS

Turning to the subject of questionable communications during the pre-election period, Benetar said that until recently threats that there may be a resort to violence as a way of dealing with anyone who might cross a picket line in the event of a future strike warranted setting an election aside.

But in late 1968, the Board overruled earlier precedents on this issue. In Hickory Springs Manufacturing Co., union representatives had made or condoned statements to the effect that, if a strike occurred, anyone who crossed the picket line would be beaten and anyone who drove a company truck would find himself in a gully.

A majority of the Board held that such statements did not preclude certification of the union's election, since none of them involved any threat or even hint of a threat toward employees based on how they voted in the election. It was a three-to-two decision (99 LRRM 1702).

Two other recent decisions, Benetar observed, illuminate the thin line between permissible and forbidden communications:

① A company was held to have engaged in unlawful interference under Section

8(a)(1) when, on learning that an organizing campaign was under way, it had its manager interview employees individually and told them that there had been a strike 14 years earlier and that, as a result, a number of persons were replaced and lost their jobs. The decision was reversed by the First Circuit (NI RB v. Eastern Smelting Corp., 101 IRRM 2328). The court said that the Board gave no reason why it considered the statement a threat, and it could see none.

- A pre election notice posted by a company stating that it was strongly opposed to a union, that a union was not needed, and that a union would "make things more difficult for all of us" was held by a Board panel not to violate the Act. It said that it could not equate the words "more difficult for all of us" with the phrase "serious harm," which had been found violative as a threat in several cases (Howard Johnson Co., 101 IRRM 1165).

Summarizing his discussion, Benetar drew these conclusions:

"We believe that elections fairly won and fairly lost provide a far sounder basis for a viable collective bargaining relationship than elections won by trick and device or by threats. In preserving the line of demarcation between fair and foul the Board is often called on to make closely balanced decisions. Its procedures of review must be kept open and the time necessary to follow these procedures must be spent.

"In the process of review the parties' right to free speech must be protected and their right to have a choice made by an informed electorate preserved.

"We do not believe any of these responsibilities should be sacrificed for administrative convenience. The Board, as an institution, is capable of providing the needed protection without invading the needed freedom.

"Employers, employees and practitioners in the field all look to the Board for just that."

Report on Case-Handling Developments at NLRB

As the person vested with final authority over the issuance of complaints under the Taft-Hartley Act, the General Counsel of the National Labor Relations Board plays a key role in the development of the law under the Act. His approach in deciding whether to issue a complaint in a particular set of circumstances can influence greatly the direction that development will take. For that reason, these reports, issued by NLRB General Counsel John S. Irving, have considerable interest and importance. In this, the quarterly report covering the fourth quarter of 1978, the General Counsel discusses selected cases decided on a request for advice from a Regional Director or an appeal from a Regional Director's dismissal of unfair labor practice charges. It also summarizes cases in which the General Counsel has sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act. Text of the first portion of that report follows. The final portion of the report will appear in the near future.

EMPLOYER DUTY TO BARGAIN

Effect of "Zipper" Clause on Employer's Duty to Bargain During Term of Collective Bargaining Agreement

One case this quarter raised the important issue of whether an Employer was obligated to meet and bargain with a Union over a variety of subjects during the term of an outstanding contract, where the agreement contained a "completeness of agreement" clause, otherwise known as a "zipper" clause.

The contract at issue, which was set to expire in 1981, did not provide for any mid-

term reopening, except for one subject not relevant to this case. The agreement contained a zipper clause which provided as follows:

Completeness of Agreement

"The parties agree that they have bargained fully with respect to all proper subjects of collective bargaining and have settled all such matters as set forth in this Agreement."

On August 16, 1978, the Union sent a telegram to the Employer which set forth about 20 subjects concerning which it wished to bargain. Some of these subjects